Chicago-Kent Law Review

Volume 95
Issue 3 *Reviving the American Jury*

Article 8

4-27-2021

THE GRASS IS GREENER SOMEWHERE: PROTECTING PRIVACY RIGHTS OF MEDICAL CANNABIS PATIENTS IN THE WORKPLACE

Benjamin West
Chicago-Kent College of Law

THE GRASS IS GREENER SOMEWHERE: PROTECTING PRIVACY RIGHTS OF MEDICAL CANNABIS PATIENTS IN THE WORKPLACE

BENJAMIN WEST*

INTRODUCTION

For many companies, recent strong economic growth has resulted in profit windfalls and increased valuation.[1] The United States unemployment rate as of August 2019 continues to remain at a "near-historic low."[2] However, accompanying low unemployment has resulted in a tightened job market throughout many parts of the country creating challenges for businesses and employers seeking to hire qualified employees.[3] This often taxing search for new, qualified employees is further complicated by the fact that many otherwise qualified applicants are disqualified due to testing positive for cannabis use as part of a company's requisite pre-employment drug test.[4] While a dearth of qualified employees is challenging for employers in a hiring market, a continued strict adherence to "zero-tolerance" policies dictating pre-employment or other cannabis drug testing as part of an employment relationship is especially problematic for medical cannabis patients regardless of whether the economy is good or not. Medical cannabis patients, even those that reside in states that have legalized cannabis for medical or recreational use, often face a difficult choice when seeking employment, either (1) cease using cannabis, or (2) find employment with an employer that does not test for cannabis use. Those caught cheating on employer-required drug tests by using substances such as synthetic urine

* J.D., May 2019, Chicago-Kent College of Law, Illinois Institute of Technology.

1. *See* Kathryn Kranhold, *Twice as Many Companies Paying Zero Taxes under Trump Tax Plan*, NBC NEWS (Apr. 11, 2019), https://www.nbcnews.com/business/taxes/twice-many-companies-paying-zero-taxes-under-trump-tax-plan-n993046 [http://perma.cc/ASD3-ATM9].

2. COUNCIL OF ECON. ADVISORS, *U.S. Unemployment Rate Remains at Near-Historic Low of 3.7 Percent; African-American Unemployment Rate Hits New Series Low*, https://www.whitehouse.gov/articles/u-s-unemployment-rate-remains-at-near-historic-low-of-3-7-percent-african-american-unemployment-rate-hits-new-series-low [http://perma.cc/629E-2TZB] (last visited Mar. 12, 2020).

3. *See* Christopher Rugaber, *More Businesses Are Mellowing Out Over Hiring Pot Smokers*, AP NEWS (May 2, 2018), https://apnews.com/7e7877c08d7e43418c08738a67bf61a4 [http://perma.cc/9XLH-9GFA].

4. *See id.*

may even risk felony criminal charges in some states.[5] These choices are unreasonable, especially where there is existing state law legalizing cannabis for medical or recreational use, taking into consideration that drug-testing should be acceptable in limited circumstances, such as for "safety-sensitive" occupations like operating heavy machinery or flying an airplane.[6]

Cannabis use among the American workforce, whether for medical or recreational purposes, is higher than it has been in over a decade.[7] Some companies and employers are voluntarily taking a more relaxed approach to zero-tolerance drug policies by excluding cannabis from their drug testing protocol, yet others continue to screen for cannabis use even though traditional screening methods, such as urinalysis, are overbroad, in that such methods may evidence cannabis use long after the impairing effects of cannabis have ceased.[8] As more states continue to legalize cannabis for medical and recreational use, some states and localities have robust employee privacy protections regarding employer drug testing,[9] while others could do more to protect medical cannabis patients from adverse employment actions resulting from job-related cannabis drug-testing.[10] This note posits the argument that states and localities should better protect medical and privacy rights of certified cannabis patients by maintaining a reasonable balance between employer concerns related to occupational safety and the rights of employees who should be free from any undue burden of choosing between medicine or employment.

Part I of this note considers cannabis in a legal and historical framework. Given the continuously growing favorable medical and public opinions regarding continued state-by-state legalization and conflicting federal

5. *See* Aditi Shrikant, *The Thriving, Legally Questionable Market for Synthetic Urine*, VOX (Apr. 11, 2019), https://www.vox.com/the-goods/2019/4/11/18302400/synthetic-urine-fake-pee-drug-test-whizzinator#targetText=Illinois%20and%20Kentucky%20have%20made,fake%20urine%20is%20a%20misdemeanor [http://perma.cc/X9UR-HSFJ].

6. *See* Alonzo Martinez, *Up In Smoke: Pre-Employment Marijuana Testing Goes Poof In NYC And Nevada*, FORBES (Aug. 16, 2019), https://www.forbes.com/sites/alonzomartinez/2019/08/16/up-in-smoke-pre-employment-marijuana-testing-goes-poof-in-nyc-and-nevada/#3f898ac438ec [http://perma.cc/73BA-K8VY].

7. Shamane Mills, *Drug Use By Workers, Job Applicants At Highest Rate In More Than A Decade*, WISCONSIN PUB. RADIO NEWS (May 14, 2018), https://www.wpr.org/drug-use-workers-job-applicants-%C2%A0highest-rate-more-decade [http://perma.cc/Q3ZS-5Q8R].

8. *See id.*

9. *See* Martinez, *supra* note 6.

10. In Illinois, for example, employers are still allowed to drug test and take adverse employment actions against employees for failing. *See* Cannabis Regulation and Tax Act, H.B. 1438, 2019 Gen. Assemb. 101st Sess. (Ill. 2019) § 10-50(a), https://www2.illinois.gov/IISNews/19996-Adult_Use_Cannabis_Legislation.pdf [http://perma.cc/G5NZ-YLUQ].

officials' views apropos of the plant's legal and medicinal-value status, why cannabis drug testing is still omnipresent throughout much of the American employment landscape seems little more than residue of anti-cannabis policy born of harshly anti-cannabis polity. Cannabis has a convoluted legal legacy in the United States and continues to remain in a legal gray area even as individual states have been legalizing cannabis for medical use for over two decades,[11] and with several states legalizing recreational use beginning in 2012.[12] Only a handful of states continue to prohibit cannabis for any medical use.[13] Yet, even as states trend toward legalization, cannabis continues to be relegated to the harshest prohibition status under the federal Controlled Substances Act ("CSA") drug-scheduling regime.[14]

The conflict between states legalizing cannabis and the federal CSA is a source of frustration for many who attempt to navigate cannabis law: Because federal law trumps state law and because federal law is adamantly prohibitive, there is little uniformity. This means that a person may legally possess cannabis in one state but not in a neighboring state. Criminal penalties for trafficking and even simple possession of cannabis can be harsh in some states,[15] while other states, such as Illinois, are expunging certain cannabis convictions for past offenders as cannabis is legalized in the state for recreational use.[16] At the federal level however, there appears little sympathy for those with cannabis convictions. For example, having a con-

11. California was the first state to legalize cannabis for medical use in 1996, with most other states following suit. *See* Adia Robinson, *Where States Stand on Legalizing Recreational and Medical Marijuana*, ABC NEWS (July 14, 2018, 3:14 AM), https://abcnews.go.com/Politics/states-stand-legalizing-recreational-medical-marijuana/story?id=56466308 [http://perma.cc/6KKY-33CN].

12. *See id.* In 2012, Washington and Colorado were the first two states to legalize cannabis for adult-use, followed by Alaska and Oregon in 2014, California, Nevada, Maine and Massachusetts in 2016. Vermont legalized recreational cannabis as of 2019.

13. Sean Williams, *The Only 4 States that Completely Can THC and CBD*, THE MOTLEY FOOL (April 22, 2018, 9:36 AM), https://www.fool.com/investing/2018/04/22/the-only-4-states-that-completely-ban-thc-and-cbd.aspx [http://perma.cc/5629-7SYQ].

14. 21 U.S.C. §812(b)(1) (2006), available at https://www.govinfo.gov/content/pkg/USCODE-2011-title21/pdf/USCODE-2011-title21-chap13-subchapI-partB-sec812.pdf [https://perma.cc/99DT-DUR3]. *See Drug Scheduling*, DEA, https://www.dea.gov/drug-scheduling [http://perma.cc/7NLG-4PFH] (last visited Mar. 12, 2020). For a more in-depth analysis of the federal prohibition status of cannabis, see David R. Katner, *Up In Smoke: Removing Marijuana from Schedule I*, 27 B.U. PUB. INT. L.J. 167, 174-78 (2018).

15. In Idaho, for example, penalties for simple possession can include up to a year of incarceration. *See* Elisabeth Garber-Paul & Tana Ganeva, *The State-by-State Guide to Weed in America*, ROLLING STONE (April 20, 2018, 9:02 PM), https://www.rollingstone.com/culture/culture-news/the-state-by-state-guide-to-weed-in-america-627968/ [http://perma.cc/M7LD-ZNT3]

16. *See* Cannabis Regulation and Tax Act, H.B. 1438, 2019 Gen. Assemb. 101st Sess. (Ill. 2019) § 10-50(a), https://www2.illinois.gov/IISNews/19996-Adult_Use_Cannabis_Legislation.pdf [http://perma.cc/G5NZ-YLUQ].

viction for simple cannabis possession can deny offenders access to important federal programs like student aid.[17]

A growing issue in states that have legalized medical cannabis, or may do so in the future, concerns employment issues, such as whether medically certified cannabis patients who are otherwise legally permitted to consume and purchase cannabis under state law should be protected against adverse employment actions based solely on employer-mandated cannabis drug-testing results. Part II of this note considers *Coats v. Dish Network*[18] and similar court decisions potentially affecting medical cannabis patients. Although cannabis may be legal to purchase and consume for medical and recreational use in many states, medical cannabis patients are not necessarily exempt from employer-mandated drug testing, even with a valid state medical cannabis certification.[19] As one recent state court case has indicated,[20] if state laws are not clear on medical cannabis use as related to employment,[21] those who continue to consume medical cannabis may risk foregoing employment opportunities or losing a job because of a drug test.

Part III of this note examines a sample of state laws that attempt to protect employees from adverse employment actions based on drug-testing alone. Part III also examines a sample of recent court decisions indicating cannabis users may be protected in certain circumstances, showing further legislation is likely necessary to achieve alternative outcomes. Some states have recently passed legislation protecting employees against adverse employment actions due to failing a drug test.[22] Even though a good deal of current state legislation has yet to be tested in the courts, states that provide clear rules and guidelines regarding employment drug testing are more likely to provide robust employee privacy protections.[23] Modifying the at-will employment standard may be an alternative to cannabis legislation in providing a path toward broadly protecting employee privacy rights, but is politically dubious. Balanced and unambiguous cannabis laws that eschew

17. Betsy Mayotte, *Drug Convictions Can Send Financial Aid Up in Smoke*, U.S. NEWS (April 15, 2015), https://www.usnews.com/education/blogs/student-loan-ranger/2015/04/15/drug-convictions-can-send-financial-aid-up-in-smoke [http://perma.cc/6HKD-D4SE].

18. Coats v. Dish Network, LLC, 350 P.3d 849 (Colo. 2015).

19. *But see* Katherine M. DiCicco & Kathryn J. Russo, *New Jersey's Amended Medical Marijuana Law Provides Job Protections and Includes Drug Testing Procedures*, DRUG & ALCOHOL TESTING L. ADVISOR (July 12, 2019), https://www.drugtestlawadvisor.com/2019/07/new-jerseys-amended-medical-marijuana-law-provides-job-protections-and-includes-drug-testing-procedures/ [http://perma.cc/B7L4-A7UW].

20. *See* 350 P.3d at 853.

21. *See* Coats v. Dish Network, LLC, 350 P.3d 849 (Colo. 2015).

22. *See* DiCicco & Russo, *supra* note 19.

23. *See id.*

most employment drug testing are likely a better option for protecting employee privacy rights and may serve as models for other states and localities where cannabis is legal.[24]

This note presents the argument that, considering the federal government's intransigence regarding rescheduling or de-scheduling cannabis and the resulting legal confusion, individual states that proceed to legalize cannabis in one form or another should concurrently move forward with crafting legislation that ensures privacy rights of employees and protection from adverse employment actions based on drug testing, specifically employees who are state-certified medical cannabis patients. Achieving a balance that protects privacy rights of employees and addresses concerns of employers, such as maintaining a safe working environment, is perhaps politically fraught, but can be achieved most effectively through effective and fair legislation. While states legalizing cannabis may attempt to strive for balance in the employment relationship, providing adequate protections to medical cannabis patients in particular should be of preeminent concern.

Illinois is a prime example of a state that has legalized cannabis for recreational and expanded medical use but does not necessarily prevent employers from drug-testing medical cannabis patients as part of a zero-tolerance drug policy. Nor does the new law, the Cannabis Regulation and Tax Act ("CRTA"), prevent Illinois employers from taking adverse employment actions against any prospective or current employee for medical cannabis use, regardless of the type of job.[25] Even Illinois-certified medical cannabis patients who never use cannabis while at work continue to be at risk of being subjected to cannabis drug-testing as a condition to obtaining or maintaining existing employment since employers may generally continue to use overbroad drug testing methods as part of their employment policy.[26] In order to promote a fair employment relationship balance with regards to zero-tolerance drug policies and employee privacy rights, the Illinois state legislature should amend the CRTA that better protects the privacy, medical and employment rights of Illinois state-certified medical cannabis patients. States similarly situated should likewise amend existing laws and those yet to legalize cannabis should consider drafting employee privacy protections into any future cannabis legislation.

24. As of January 2020, employers will also be limited in pre-employment drug testing for cannabis in Nevada and New York City. *See* Martinez, *supra* note 6.

25. There are a few exceptions, such as that policies must be "reasonable" and "nondiscriminatory." Cannabis Regulation and Tax Act, H.B. 1438, 2019 Gen. Assemb. 101st Sess. (Ill. 2019) § 10-50(a), https://www2.illinois.gov/IISNews/19996-Adult_Use_Cannabis_Legislation.pdf [http://perma.cc/G5NZ-YLUQ].

26. *See id.*

I. THE CONVOLUTED LEGAL LEGACY OF CANNABIS

A. Legal Treatment of Cannabis Pre-1970

For most of human existence, there has been no regulation on or prohibition of cannabis.[27] Recent archaeological evidence reveals that humans were using cannabis in smokable form as early as 2,500 years ago in China.[28] The cannabis plant has been utilized by Americans since before the time of the founding fathers, with many prominent early-American figures known or believed to have either produced or traded the plant in one form or another.[29] Hemp, the stalk portion of the cannabis plant, was used by early settlers to produce valuable commodities such as paper, clothing, and rope.[30] The flower of the cannabis plant, known to contain the most concentrated amount of the psychoactive compound, tetrahydrocannabinol,[31] was prescribed widely by physicians in the nineteenth century and was viewed as medically beneficial for a range of ailments.[32] Cannabis has been used and cultivated for thousands of years, as cannabis advocate, Jack Herer, notes in his influential book, The Emperor Wears No Clothes:

> From at least the 27th to 7th century B.C. up until this century, cannabis was incorporated into virtually all the cultures of the Middle East, Asia Minor, India, China, Japan, Europe, and Africa for its superior fiber, medicines, oils, food, and for its meditative, euphoric, and relaxational uses. Hemp was one of our ancestors' most important overall industries, along with tool making animal husbandry and farming.[33]

Although humans have been growing, consuming, and trading cannabis for a long period of time with little to no regulation, it has only been prohibited by law for a relatively short time. In the United States, the history of cannabis prohibition does not begin with a law regarding cannabis at all, but rather with a law prohibiting opium in 1875.[34] In 1883, due to perceived problematic opium use among certain immigrant populations, Con-

27. PETER MCWILLIAMS, AIN'T NOBODY'S BUSINESS IF YOU DO 297 (1996) (However, McWilliams notes that cannabis was banned by the early Christian Church during the Inquisition because it was "associated with paganism").

28. Joel Achenbach, *Archaeologists Find Signs of Ritualized Cannabis use 2,500 years ago in China*, WASH. POST (June 12, 2019), https://www.washingtonpost.com/science/2019/06/12/archaeologists-find-signs-ritualized-cannabis-use-years-ago-china/ [http://perma.cc/8VRE-PA7V].

29. *See* Katner, *supra* note 14, at 174.

30. *Id.*

31. Better known as "THC," the main psychoactive compound found in cannabis. *See* Rae Lland, *What is THC?*, LEAFLY (Dec 2, 2016), https://www.leafly.com/news/cannabis-101/what-is-tetrahydrocannabinol [http://perma.cc/A6K4-5A37].

32. *See* Katner, *supra* note 14, at 174.

33. JACK HERER, THE EMPEROR WEARS NO CLOTHES 95 (1985).

34. MCWILLIAMS, *supra* note 27, at 273.

gress began heavily taxing opium with the intent to decrease demand.[35] Even though Congress' mission had very limited success, it signaled the beginning of a practice of taxation and regulation of what the government considers illicit drugs.[36]

At the beginning of the twentieth century, Congress continued regulating drugs, passing the Pure Food and Drug Act in 1906 and the Harrison Narcotics Act ("HNA") in 1914.[37] The latter of these acts did not actually make the referenced drugs illegal, but, like the original opium tax of 1883, the HNA specifically taxed importing and distributing opium and coca.[38] The results of the HNA were not favorable and resulted in an increase in the use of the drugs the government had intended to eliminate.[39] In an effort to stymie this increase, the Federal Narcotics Control Board was established in 1922, which subsequently made heroin illegal two years later in response to surging heroin use.[40]

However well-intentioned, government prohibitions failed to stop the demand for heroin and the government again reacted by enacting more laws. In 1930, it created a new federal agency, the Federal Bureau of Narcotics directed by Commissioner Harry Anslinger.[41] Anslinger was particularly known for his intensity and fervor regarding cannabis prohibition and was successful in getting most states to enact laws against cannabis by 1937.[42] That same year, Anslinger crafted and introduced the Marijuana Tax Act ("MTA")[43] to Congress against the backdrop of a formidable anti-cannabis propaganda campaign conducted by Anslinger himself.[44] Just as the HNA attempted to tax opiates and coca, the MTA attempted to tax cannabis, with the intent to prohibit cannabis completely.[45] The MTA presented a legal impossibility, in that it required a person who wished to engage in the transfer of cannabis to register with an official with cannabis in hand in order to obtain legal transfer status.[46] However, not long after the MTA was enacted, every state had implemented its own prohibitions against cannabis possession, making it impossible to obtain the requisite legal sta-

35. *Id.*
36. *Id.* at 276.
37. *Id.*
38. *Id.* at 277.
39. *Id.*
40. *Id.* at 278.
41. *Id.*
42. *Id.* at 283.
43. Marihuana Tax Act of 1937, Pub. L. No. 75-238, 50 Stat. 551 (1937).
44. MCWILLIAMS, *supra* note 27, at 285.
45. *Id.*
46. *See generally* Marihuana Tax Act of 1937, 50 Stat. 551.

tus under federal law without self-incrimination for possession under state law.[47] It was not until 1969 when the Supreme Court heard *Leary v. United States* that the MTA was finally challenged on constitutional grounds.[48] Timothy Leary challenged the Act after having been convicted of transporting and concealing cannabis, claiming that the Act violated the Fifth Amendment's protection against self-incrimination.[49] The Court agreed, and Leary's conviction was overturned, spelling the end of the MTA.[50] However, the prohibition and regulation of cannabis did not end there.

B. Legal Treatment of Cannabis Post-1970

In 1970, in reaction to the Court's decision in *Leary*, President Nixon signed the Controlled Substances Act ("CSA") into law.[51] Still in effect today, The CSA proscribes five "schedules" for substances under federal control.[52] Schedule I controlled substances are considered the most dangerous and are therefore the most restricted, with fewer restrictions for substances in schedules II-V.[53] Despite efforts to change the law,[54] cannabis continues to be classified as a "[s]chedule I drug . . . with no currently accepted medical use . . . a high potential for abuse and the potential to create severe psychological and/or physical dependence" along with heroin, LSD, ecstasy, and peyote.[55] While limited scientific research on cannabis was conducted when the CSA was signed into law in 1970, research has grown considerably and many in the scientific and medical community endorse its use to treat a wide range of diseases and ailments.[56] Today, the majority of

47. MCWILLIAMS, *supra* note 27, at 285.

48. 395 U.S. 6 (1969).

49. *Id.*

50. *Id.*

51. During the early 1970's President Nixon claimed Timothy Leary was "the most dangerous man in America." *See* Bill Minutaglio & Steven L. Davis, *The Blood Feud that Launched the War on Drugs*, POLITICO (Jan. 9, 2018), https://www.politico.com/magazine/story/2018/01/09/richard-nixon-war-on-drugs-timothy-leary-216264 [http://perma.cc/EKL3-XA74].

52. *See* 21 U.S.C. §812(b)(1)-(5) (2006), https://www.govinfo.gov/content/pkg/USCODE-2011-title21/pdf/USCODE-2011-title21-chap13-subchapI-partB-sec812.pdf [https://perma.cc/99DT-DUR3]. *See Drug Scheduling*, DEA, https://www.dea.gov/drug-scheduling [http://perma.cc/7NLG-4PFH] (last visited Mar. 12, 2020).

53. *See supra* note 52 and accompanying text.

54. *See, e.g.*, States' Medical Marijuana Patient Protection Act, H.R. 689, 113th Cong. (2013).

55. *See Drug Scheduling*, *supra* note 52.

56. *See* Harvard University, *Marijuana: The Latest Scientific Findings and Legalization*, YOUTUBE (April 4, 2017), http://www.youtube.com/watch?v=HvRf_3Bil0A. Cannabis has also been shown to alleviate pain in cancer patients and promising studies have shown that cannabis is useful for treating patients with Alzheimer's disease and anorexia. *See* Vincent Vinciguerra, Terry Moore & Eileen Brennan, *Inhalation Marijuana as an Antiemetic for Cancer Chemotherapy*, 85, N.Y. ST. J. MED. 525, 525-27 (1988); *see generally* Ladislav Volicer et al., *Effects of Dronabinol on Anorexia and*

states have recognized the medical value of cannabis by allowing legal access to cannabis for medical use in the face of federal prohibition.[57]

A year after Congress adopted the CSA, Nixon began what was known as the "war on drugs" and further escalated the prohibition of cannabis in the employment context, requiring many employers to report employees found to have used illegal drugs while on the job.[58] While Presidents Ford and Carter "distanced themselves from the drug issue" during the latter part of the 1970s,[59] President Reagan reignited Nixon's war on drugs in the 1980s, culminating in the Drug-Free Workplace Act of 1988 which required government employers and others to conduct drug testing for their employees.[60] Congress also passed the Anti-Drug Abuse Act, which established the Office of National Drug Control Policy ("ONDCP"), which was tasked with managing federal drug control.[61] The Reagan era anti-drug policies are cited as being the impetus for all employment drug testing since.[62]

In 2005, the Supreme Court, in *Gonzales v. Raich*, held that the CSA, as applied to the medicinal use of cannabis, did not violate the Constitution because of Congress's broad power to regulate cannabis under the Commerce Clause.[63] The Court reasoned that the Commerce Clause allows Congress to regulate local economic activity, that "substantially" affects interstate commerce, even where states choose to experiment with legalizing medical cannabis intended for personal consumption within the state.[64] The Court's decision set a precedent that, as Justice O'Connor noted in dissent, "extinguishes that experiment, without any proof that the personal cultivation, possession, and use of marijuana for medicinal purposes, if

Disturbed Behavior in Patients with Alzheimer's Disease, 12 INT'L J. GERIATRIC PSYCHIATRY 913 (1997).

57. In Illinois, for example, the Illinois Department of Public Health recognizes an extensive list of debilitating conditions that qualify patients for medical cannabis registry, *see* Illinois Department of Public Health, *Debilitating Conditions*, http://www.dph.illinois.gov/topics-services/prevention-wellness/medical-cannabis/debilitating-conditions [http://perma.cc/YB2M-HV52] (last visited Mar. 12, 2020).

58. *See generally* A. BENAVIE, DRUGS: AMERICA'S HOLY WAR (2012).

59. DAVID BOYUM & PETER REUTER, AN ANALYTIC ASSESSMENT OF U.S. DRUG POLICY 6 (2005).

60. A. BENAVIE, *supra* note 58.

61. BOYUM & REUTER, *supra* note 59, at 7-8.

62. Joe Pinsker, *The Pointlessness of the Workplace Drug Test*, THE ATLANTIC (June 4, 2015), https://www.theatlantic.com/business/archive/2015/06/drug-testing-effectiveness/394850/ [http://perma.cc/B7AD-WHJC].

63. 545 U.S. 1, 2 (2005).

64. *Id.*

economic activity in the first place, has a substantial effect on interstate commerce and is therefore an appropriate subject of federal regulation."[65]

Similarly, in *U.S. v. Oakland Cannabis Buyers' Co-op.*, the Court held that there is no exception, medical or otherwise, to the CSA's prohibition against distributing and manufacturing cannabis.[66] The Court cited the CSA scheduling language regarding cannabis, noting the only "express exception . . . is available . . . for Government-approved research projects."[67] The result of this decision is that there are severely limited options for scientists to do extensive research that aligns with the federal restriction.[68] Yet, these limitations have certainly not slowed the efforts of states that continue experimenting with various forms of cannabis legalization in the face of federal prohibition.

States continued to legalize cannabis in one form or another during the Obama era as tension grew over the ongoing strict federal prohibition.[69] However, rather than rescheduling cannabis under the CSA, the Department of Justice under the Obama administration put forth a policy in the form of the "Cole Memo," which essentially deprioritized criminally prosecuting most cannabis cases.[70] The Cole Memo was not a permanent fix to the underlying issue over the treatment of cannabis under the CSA, but it suggested that where states had made their own laws regarding legalizing cannabis, United States Attorneys should not squander resources prosecuting cannabis cases.[71] Further efforts were made during the Obama era to provide protections for states wishing to implement medical cannabis access, but these efforts, such as the Rohrabacher-Farr Amendment limiting the Justice Department's use of federal funding to prosecute state medical cannabis programs, were limited.[72]

Fears of a federal clampdown on cannabis reemerged with the election of President Donald Trump in 2016.[73] Trump's former Attorney General, Jeff Sessions, went on record to make such absurd statements as "good

65. *Id.*

66. 532 U.S. 483, 486 (2001).

67. *Id.* at 490.

68. *But see* Will Stone, *Researching Medical Marijuana May Soon Get Easier*, NPR NEWS (Aug. 27, 2019), https://www.npr.org/sections/health-shots/2019/08/27/754761944/researching-medical-marijuana-may-soon-get-a-lot-easier [http://perma.cc/R8RG-K4ZF].

69. *See* James Higdon, *Jeff Sessions' Coming War on Legal Marijuana*, POLITICO (Dec. 5, 2016), http://www.politico.com/magazine/story/2016/12/jeff-sessions-coming-war-on-legal-marijuana-214501 [http://perma.cc/7X6U-3X8L].

70. *Id.*

71. *Id.*

72. *Id.*

73. *Id.*

people don't smoke pot."[74] And, though Sessions has since resigned, the President appears to continue to support the current federal policy of cannabis remaining illegal at the federal level.[75] Until the federal government conforms with current favorable medical and public opinion regarding cannabis legalization and seriously reconsiders the harsh treatment of cannabis under federal drug scheduling laws, federal criminal prosecution continues to be a potential threat to medical patients, consumers, and the growing cannabis industry.

Given the historically absurd legal treatment of cannabis, the ideal course of action going forward would be to remove it from the CSA scheduling altogether, so that most criminal cases are no longer pursued, threatened, or prosecuted under any law of the United States. The effect of this would lessen the enormous costs associated with its prosecution, abate the federal government's reach when it comes to privacy rights, and legitimize the federal government's authority to prosecute criminal cases that truly threaten public safety and security.[76] Federal legalization of cannabis may have the additional effect of ending most employment-related cannabis drug testing if cannabis is no longer considered a controlled substance or relegated to Schedule I of the CSA. If an employer's policy includes testing for "illegal" drugs and cannabis is not "illegal" under any law of the United States, then companies will likely need to have another justification for cannabis testing or join the growing number of others in abandoning testing for it altogether.[77] In the meantime, states will need to continue their efforts in legalizing cannabis on their own and should strive for protecting employee rights when it comes to drug testing, especially the rights of medical cannabis patients.

II. CANNABIS AND EMPLOYMENT LAW: THE CONUNDRUM FOR MEDICAL CANNABIS PATIENTS

For certified medical cannabis patients, criminal prosecution is less of a concern since patients are largely protected from criminal prosecution under state law. A bigger issue, however, is whether cannabis use will sub-

74. *Id.*

75. *See* Brendan Bures, *Trump Administration Doubles Down on Anti-Marijuana Position*, CHI. TRIB. (Feb 21, 2020), https://www.chicagotribune.com/marijuana/sns-tft-trump-anti-marijuana-stance-20200221-jfdx4urbb5bhrf6ldtfpxleopi-story.html [http://perma.cc]

76. *See generally* David R. Katner, *Up In Smoke: Removing Marijuana from Schedule I*, 27 B. U. PUB. INT. L.J. 167 (2018).

77. *See* Margot Roosevelt, *In The Age of Legal Marijuana, Many Employers Drop 'Zero Tolerance' Drug Tests*, L.A. TIMES (April 12, 2019), https://www.latimes.com/business/la-fi-marijuana-drug-test-hiring-20190412-story.html [http://perma.cc/CT3C-5HT9].

ject them to an adverse employment action if they test positive for cannabis as part of an employer-mandated drug screen, even if the patient/employee only consumes cannabis during non-work time. The prospect of applying for a new job where drug screening for cannabis remains the employer's status quo is onerous for many medical cannabis patients and presents a serious employment obstacle for those patients who wish to continue to use their medication. The reason for this is that common drug testing used in employment, such as urinalysis, is unfairly and unnecessarily overbroad because it tests for cannabis use well beyond any impairment window.[78] While drug testing in the employment context typically involves testing for a variety of drugs illegal under the CSA, cannabis is by far the most frequent to result in a positive drug test result.[79] The main reason for this is that, unlike other controlled substances, cannabis remains in the body for a relatively long time and can appear on drug tests for many weeks or even months after a person has consumed it, resulting in a positive test long after any notably impairing effects have worn off.[80]

Some studies of cannabis eschew the negative effects of such substances in relation to the ability to function at work while noting that work-related functionality depends on a number of factors that do not always align with each other.[81] For example, the dosage and frequency of cannabis use can have a major impact on the level of impairment.[82] One of the biggest concerns for employers is not necessarily whether an employee consumed cannabis weeks or even months ago, but whether they are showing up for work intoxicated and unable to function or present an imminent safety risk.[83] Regardless of the disagreement among various studies of the effect of cannabis on work performance and efficiency, there is a general consensus that the intoxicating effects of cannabis only last a few hours,[84]

78. *See* Mills, *supra* note 7.

79. *Workforce Drug Positivity Climbs to Highest Rate Since 2004, According to New Quest Diagnostics Analysis*, QUEST DIAGNOSTICS: DRUG TESTING INDEX (Apr. 11, 2019), https://www.questdiagnostics.com/home/physicians/health-trends/drug-testing [http://perma.cc/U2KV-B7WU].

80. Stacy Hickox, *Drug Testing of Medical Marijuana Users in the Workplace: An Inaccurate Test of Impairment*, 29 HOFSTRA LAB. & EMP. L.J. 273, 299 (2012).

81. *See generally* Raul Gonzalez et al., *Nonacute (Residual) Neuropsychological Effects of Cannabis Use: A Qualitative Analysis and Systematic Review*, 42 J. CLINICAL PHARMACOLOGY 48S (2002).

82. *See* Harrison G. Pope, Jr. et al., *Neuropsychological Performance in Long-Term Cannabis Users*, 58 ARCHIVES GEN. PSYCHIATRY 909, 915 (2001); CARL L. HART & CHARLES KSIR, DRUGS, SOCIETY & HUMAN BEHAVIOR 367 (14th ed. 2011).

83. Asam C. Uzialko, *Cannabis at Work: How Employers are Reacting to the Legalization of Marijuana*, BUS. NEWS DAILY (Feb. 1, 2019), https://www.businessnewsdaily.com/9386-legal-marijuana-employment-practices.html [http://perma.cc/5KXC-7H3X].

84. *See* Hickox, *supra* note 80, at 312.

therefore drug testing that tests for cannabis use beyond working hours is unnecessarily overbroad and should be considered obsolete and an inaccurate measure of intoxication.[85]

Even though states are continuing to legalize cannabis, and a growing list of employers are voluntarily abandoning cannabis drug testing,[86] there are many more employers that continue to freely maintain a "zero-tolerance" policy for all CSA-prohibited controlled substances, including cannabis.[87] This is the case even in states that have gone as far as to legalize cannabis for recreational use.[88] While certain occupations, such as flying an aircraft, driving a truck, or using potentially hazardous machinery may warrant the extra level of security ostensibly provided by drug testing, for most occupations cannabis drug testing is likely unnecessary and ineffective, serving only to prop up the profitable drug testing industry. State courts will likely continue to weigh in on specific cannabis use and employment issues as they arise, but as the following cases illustrate, adequate and well-drafted legislative protections are the foundation to ensuring fairness and justice in the courts.

For example, in *Ross v. Ragingwire Telecommunications, Inc.*, the California Supreme Court examined whether an employer must provide a "reasonable accommodation" for a medical cannabis patient.[89] The plaintiff, Gary Ross, a former United States Air Force servicemember, was prescribed cannabis for pain resulting from injuries he suffered during his

85. *See* Eric Westervelt, *The Pot Breathalyzer is Here. Maybe*, NPR (Aug. 4, 2018), https://www.npr.org/2018/08/04/634992695/the-pot-breathalyzer-is-here-maybe [http://perma.cc/M8NX-WCE5]. Several startup technology companies have developed what they and many in law enforcement herald as an innovative solution to the problem of overbreadth in traditional drug testing: a breathalyzer device that detects cannabis use within an approximately two-hour window after consumption, *id*. However, such technology may be problematic when applied in the employment context, exacerbating existing privacy issues regarding employment cannabis drug testing due to technological limitations and procedural privacy concerns. Cannabis breathalyzer testing may hold great promise for employers, as it would eliminate the need for relying on traditionally overbroad drug screening methods, like urinalysis. However, the cannabis breathalyzer is currently only in the pre-production stage and is not yet available for purchase, *id*. Also, while the device can detect THC in a person's breath, it is unable to tell how much THC may be in a person's system, *id*. This could be especially problematic for medical cannabis patients who take forms of cannabis that have low, but detectable THC concentrations in their breath. Another issue is how new testing methods should be administered so as to ensure privacy rights of employees. Additional legislation is likely necessary to protect employee privacy rights as drug-testing technology develops and is an area for further research.

86. *See* Allen Schaben, *In the Age of Legal Marijuana, Many Employers Drop 'Zero Tolerance' Drug Tests*, L.A. TIMES (Apr. 12, 2019), https://www.latimes.com/business/la-fi-marijuana-drug-test-hiring-20190412-story.html [http://perma.cc/CT3C-5HT9].

87. Dan Hyman, *When the Law Says Using Marijuana is O.K., But the Boss Disagrees*, N.Y. TIMES (July 19, 2019), https://www.nytimes.com/2019/07/19/business/marijuana-employer-drug-tests.html [http://perma.cc/U6DU-WG9W].

88. *See id.*

89. Ross v. Ragingwire Telecomm., Inc., 174 P.3d 200, 203 (Cal. 2008).

military service.[90] Due to his injuries, Ross's physician recommended that and certified Ross to consume cannabis pursuant to California's Compassionate Use Act of 1996 ("CUA"), a California law that allows the use of cannabis for medical purposes.[91] In 2001, Ross was offered a job with Ragingwire Telecommunications, but the offer was contingent on his passing a pre-employment drug test.[92] Ross consented to the test and was soon informed that he had failed due to testing positive for cannabis use.[93] Ross presented the employer with a copy of his physician's certification, but was told that he was terminated due to the positive test result regardless of the certification.[94] Ross filed a suit against Ragingwire, alleging his discharge was unlawful under the California Fair Employment and Housing Act ("FEHA") and against public policy.[95] The lower courts held that Ross "could not state a cause of action against his employer for disability-based discrimination under the FEHA or for wrongful termination in violation of public policy."[96] On appeal, the California Supreme Court upheld the lower courts by holding that an employee is not protected from termination due to a positive drug test result even if the employee is protected from state criminal prosecution under the CUA.[97] The court reasoned that "[n]othing in the Act's text or history indicates the voters intended to articulate any policy requiring employers to accommodate marijuana use by employees. Because the Act articulates no such policy, to read the FEHA in light of the CUA leads to no different result."[98] In addition, the court dismissed Ross's argument that his termination was against public policy regarding his right to "submit to lawful medical treatment," holding that the employer defendant was not required to accommodate Ross's cannabis use since Ross's right to refuse medical treatment was not implicated by the adverse employment action.[99]

In 2010, in *Emerald Steel Fabricators Inc. v. Bureau of Lab. And Industries*, the Oregon Supreme Court handed down a similar decision, reversing the Oregon Court of Appeals by concluding that the employer in question, Emerald Steel Fabricators, had not discriminated when it fired an

90. *Id.*
91. *Ragingwire*, 174 P.3d at 204.
92. *Id.* at 203.
93. *Id.*
94. *Id.*
95. *Id.*
96. *Id.* at 202.
97. *Id.* at 209.
98. *Id.* at 208.
99. *Id.* at 209.

employee for failing a drug test.[100] The employee was a temporary worker for Emerald Steel and was being considered for permanent employment; however, he was required to submit to a drug test that included screening for cannabis as a condition to the permanent offer.[101] The employee revealed to his supervisor that he was a certified medical cannabis patient licensed under the Oregon Medical Marijuana Act ("OMMA"), but was still terminated because of his positive cannabis test result.[102] The court noted that the OMMA only protects registered Oregon cannabis patients from state criminal prosecution, not adverse employment actions, therefore, the employer was not obligated to accommodate the employee's disability under ORS 659A.112, the Oregon statute prohibiting disability discrimination.[103] The court's decision was based on Oregon statute, ORS 659A.124, which states that the "protections of ORS 659A.112 ([e]mployment discrimination) do not apply to any employee who is currently engaging in the illegal use of drugs if the employer takes action based on that conduct."[104] The court reasoned that use of medical cannabis, even though legal under Oregon state law, was an "illegal use of drugs" under the federally preemptive CSA.[105] The result of the court's decision is ominous for medical cannabis patients in Oregon without amendatory legislative action, as it means that employers may terminate an employee for failing a cannabis drug test even if the employee has a valid medical cannabis card issued by the state.

In Colorado, one of the most progressive states when it comes to legalized cannabis,[106] there is additional cause for concern for medical cannabis patients who are employed or who are seeking employment, considering the 2013 decision in *Coats v. Dish Network, L.L.C.*[107] In *Coats*, Brandon Coats, a quadriplegic, had been issued a medical cannabis card as permitted by an amendment to the Colorado state constitution and was legally, under Colorado state law, permitted to purchase and use cannabis to alleviate his medical condition.[108] While Coats contended that he was never under the influence of cannabis at work, and never used it at work, he

100. Emerald Steel Fabricators, Inc. v. Bureau of Lab. and Indus., 230 P.3d 518, 520 (Or. 2010).

101. *Id.* at 520-21.

102. *Id.*

103. *Id.* at 521.

104. *Id.* at 524.

105. *Id.* at 521.

106. Robert McCoppin, *Recreational Marijuana Has Been Legal in Colorado for Years. What Can Illinois Learn Before Its Residents Start Firing Up?*, CHI. TRIB. (Mar. 21, 2019, 6:45 AM), https://www.chicagotribune.com/news/ct-met-colorado-marijuana-legalization-lessons-for-illinois-20190312-story.html [http://perma.cc/R4CN-W5F6].

107. Coats v. Dish Network, LLC, 350 P.3d 849 (Colo. 2015).

108. *Id.* at 850.

was terminated from his job at Dish Network after testing positive for cannabis during a random employment drug screening.[109] Coats claimed that he was protected under state law from the "unlawful prohibition of legal activities as a condition of employment," citing a Colorado statute.[110] The question for the court was whether medical cannabis use should be considered "lawful activity" as interpreted by the text of the Colorado Lawful Activities Statute.[111] The Colorado Supreme Court concluded that it was not.[112] The court analyzed the relevant text of the statute, which states that "[i]t shall be a discriminatory or unfair employment practice for an employer to terminate the employment of any employee due to that employee's engaging in any lawful activity off the premises of the employer during nonworking hours."[113] For the court, the issue turned on the majority's strict interpretation of the word "lawful" as it appeared in the statute, determining that there was "no legislative intent to extend employment protection to those engaged in activities that violate federal law."[114] The court further noted that "while the [Lawful Activities] statute promotes a 'hands-off' policy for a broad range of off-the-job employee behavior, it still maintains the larger balance between employer and employee rights reflected in Colorado's at-will employment."[115]

California, Oregon, and Colorado are not the only states where suits have been brought by employees terminated for failing drug tests even though state law permitted them to consume cannabis with a valid medical recommendation and certification.[116] However, there is some hope that state courts are moving away from ceding to onerous federal law when it comes to medical cannabis use in the employment context.[117] For example, in New Mexico, an employee sued his employer because the employer refused to pay for his medical cannabis under the New Mexico Worker's Compensation Act ("WCA").[118] While the employer argued that paying for the employee's medical cannabis would be a federal crime, the court disa-

109. *Id.* at 850-51.

110. *See* COLO. REV. STAT. ANN. § 24-34-402.5 (West 2007).

111. Coats v. Dish Network, LLC, 303 P.3d 147, 148 (Colo. App. 2013), *aff'd* 350 P.3d 849 (Colo. 2015).

112. *Coats*, 350 P.3d at 852.

113. *Id.*

114. *Coats*, 303 P.3d at 151, *aff'd* 350 P.3d 849 (Colo. 2015).

115. *Id.*

116. *See* Casias v. Wal-Mart Stores, Inc., 695 F.3d 428, 431 (6th Cir. 2012).

117. *See* Braska v. Challenge Mfg. Co., 861 N.W. 2d 289 (Mich. Ct. App. 2014); Maez v. Riley Indus., 347 P. 3d 732 (N.M. Ct. App. 2015); Lewis v. Am. Gen. Media, 355 P. 3d 850 (N.M. Ct. App. 2015).

118. Vialpando v. Ben's Auto. Servs. 331 P.3d 975, 976 (N.M. Ct. App. 2014).

greed and sided with the employee, holding that the medical cannabis was "reasonable and necessary for the worker's treatment" and therefore he was protected under the WCA.[119] The court explained that whether cannabis was considered a prescription drug or a controlled substance for purposes of the WCA was irrelevant since medical cannabis "requires the functional equivalent of a prescription—certification to the program."[120] While court decisions are important regarding the nexus of cannabis and employment law, well-drafted legislation that protects privacy rights of medical cannabis patients in the workplace while ensuring employers are able to maintain a safe working environment is essential to sound public policy. Achieving this balance is legislative in foundation, and state legislators should consider and question the essence of the employment relationship as part of a larger process of determining appropriate and necessary legal safeguards regarding privacy rights and drug-testing.

III. EXPERIMENTING WITH STATUTORY SOLUTIONS AND LEGISLATION AT THE STATE LEVEL

A. Undermining the At-Will Employment Doctrine as an Option to Protect Medical Cannabis Patients from Adverse Employment Actions

To counter state court decisions such as *Coats*, *Ragingwire*, and *Emerald Steel*, perhaps what is truly needed is a radical reconstruction of the common-law regime apropos of the at-will employment doctrine. Throughout most of the United States,[121] the default rule when it comes to establishing or terminating an employer-employee relationship is the "at-will" employment doctrine.[122] What this means, on one hand, is, essentially, that an employee is free to quit his or her job at any time and for any reason. While this sounds like a given, considering a person cannot be forced to work at a job based on the anti-slavery language found in the Thirteenth Amendment of the United States Constitution,[123] it is a general "right to contract" argument that is propagated by those in favor of the at-will em-

119. *Id.* at 978.

120. *Id.* at 979.

121. One exception is Montana, which has a provision for termination for "just cause." *See Frequently Asked Questions*, MONT. DEP'T LAB. & INDUSTRY, http://dli.mt.gov/resources/faq [http://perma.cc/852Z-Q4VF] (last visited Mar. 12, 2020).

122. For an in-depth examination of the common-law history and economic theories behind the at-will employment doctrine, see Matthew T. Bodie, *The Best Way Out Is Always Through: Changing the Employment-at-Will Default Rule to Protect Personal Autonomy*, 2017 U. ILL. L. REV. 223 (2017).

123. The Thirteenth Amendment states: "Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction." U.S. Const. amend. XIII.

ployment doctrine that underpins the law, not necessarily a constitutional one.[124] Just as employees are free to end the employment relationship at any time for any reason, the at-will employment relationship gives employers the same, reciprocal rights. Yet, in such a situation—under the default rule—employers generally have most of the bargaining power, even in a good economy.

Such uneven bargaining power effectively bestows upon an employer—barring a retaliation or discrimination claim under Title VII, the Americans with Disabilities Act, the Age Discrimination in Employment Act, or other similar state or federal law—the arbitrary right to terminate an employee for any reason or no reason at all.[125] Beyond discrimination claims, one of the few exceptions to the at-will default rule is when an employee is covered under a collective bargaining agreement with a union or an employment contract provision that takes precedence over the at-will default, including a salient clause that provides that the employee can be fired only for "just cause."[126]

Largely due to the potential disenfranchisement and other adverse effects on employees, who could theoretically have a job one day and not the next based on some superficial whim of an employer, the at-will employment doctrine has been criticized by many, even those within the business community.[127] In regards to cannabis, employers may have a legitimate concern for occupational safety when it comes to cannabis use just as they may with other intoxicants like alcohol, even if technically legal under state law. However, from a public policy and public health perspective, it seems unreasonable to limit a medical patient from using medication recommended by a doctor and sanctioned by state law if it has no measurable adverse effect on their work or on the business of their employer. It is highly unlikely that any law or collective-bargaining agreement will protect an em-

124. The National Conference of State Legislatures states that "reasons given for our retention of the at-will presumption include respect for freedom of contract, employer deference, and the belief that both employers and employees favor an at-will employment relationship over job security." *At-Will Employment—Overview*, NCSL (Apr. 15, 2008), http://www.ncsl.org/research/labor-and-employment/at-will-employment-overview.aspx [http://perma.cc/FNH5-XJFA] (last visited Mar. 12, 2020).

125. There are other limited exceptions to the employment-at-will doctrine, depending on the state. *See* Charles J. Muhl, *The Employment-at-Will Doctrine: Three Major Exceptions*, MONTHLY LAB. REV. (2001), https://www.bls.gov/opub/mlr/2001/01/art1full.pdf [http://perma.cc/FNK8-SZYZ].

126. For a comprehensive list of exceptions, see *id.*

127. Liz Ryan, a contributor for Forbes.com, has suggested that at-will employment hurts business, because "it keeps working people focused on behaviors that will preserve their employment status, at the expense of airing ideas and issues whose open discussion would be in the best interests of their employers." Liz Ryan, *How At-Will Employment Hurts Business*, FORBES (May 1, 2014), https://www.forbes.com/sites/lizryan/2014/05/01/how-at-will-employment-hurts-business/#73d5425934d5 [http://perma.cc/CJ3W-5LM2].

ployee from an adverse employment action when the employee shows up to work clearly intoxicated.[128] But when it comes to cannabis use outside of work, especially for medical use, as the late self-help author and cannabis advocate Peter McWilliams would say, it "ain't nobody's business if you do."[129]

What if, however, the at-will employment default rule was changed to allow for a carve-out that would protect the personal autonomy of workers who are not otherwise protected by union representation or a well-crafted employment contract?[130] The at-will employment rule could be modified to allow for a "personal-autonomy presumption."[131] Such a presumption would assume that employers and employees have a fairly-bargained for "contractual" relationship, in which they agree not to "base decisions affecting the contractual relationship on factors that take place outside of that relationship."[132] This revised default rule may result in employers and employees better communicating about expectations regarding off-duty behavior through a more firm contractual relationship than currently exists under the at-will employment regime.[133] Employers could bargain for certain provisions making exceptions for serious criminal acts that might occur outside of the contractual relationship, such as fraud or domestic violence. Importantly, however, contractual bargaining would be the underpinning of the employment relationship rather than arbitrary decision-making favoring employers.

While modifying or undermining the at-will employment doctrine may sound like a promising route for protecting employee privacy rights, there are likely serious problems with implementing such changes. For one, such a radical change will face steep resistance from the employer lobby, probably more so than legislative restrictions on an employer's zero-tolerance drug policy. Depending on the state, legislators would likely be under enormous pressure from employer groups opposed to modifying the at-will doctrine status quo. Second, employees may not have adequate bargaining power even with a modified at-will scenario, absent union repre-

128. The arbitrator in the case of an employee (represented by a union) fired for testing positive for cannabis found that, even though the employee was a medical cannabis cardholder, "it does not mean he has permission to report for work under its influence." Labor Arbitration Decision, 2012 BNA LA Supp. 149225, at *5 (Brodsky, Arb.).

129. *See* MCWILLIAMS, *supra* note 27.

130. Bodie, *supra* note 122, at 226.

131. *Id.* at 262.

132. *Id.* at 264.

133. *Id.* at 264-65.

sentation. With shrinking private sector union enrollment nationally,[134] increased employee bargaining power is unlikely in the near future. Third, when it comes to cannabis and employment drug testing, without effective state legislation, employers may point to the strict scheduling language of the federal CSA that essentially forbids any use of cannabis, medical or otherwise.[135] Indeed, the latter of these limitations on changing the at-will employment regime is likely to be especially problematic for employees as the language in many state "lawful activity" statutes are unclear as to what kind of non-work activities are protected.[136] This was one of the key issues for the court in *Coats*, where the court's decision relied on the fact that the plaintiff's medical use of cannabis was not "legal" under controlling federal law and the personal autonomy language in the Colorado statute did not specifically protect employees who consumed cannabis.[137] Given these problems with undermining or modifying the well-established at-will employment doctrine, it may be an easier task to push for de-scheduling cannabis at the federal level. However, given the current polity is unlikely to support such a move in the near future, there may be other statutory solutions that states can and have implemented in the interim that would protect employees who are also medical cannabis patients from adverse employment actions and invasive drug testing.

B. Crafting Statutes that Specifically Protect Medical Cannabis Patients is Necessary in Light of Changing State Laws Legalizing Cannabis

Based on a survey by the California chapter of the National Organization for Marijuana Legalization ("NORML"), since the passage of Prop. 64, which legalized the use of medical cannabis for qualified patients in California, some 30% of those polled in the survey mentioned they had either been refused employment or fired from their job after having tested positive for cannabis.[138] As of 2019, a total of eleven states, including Arizona, Arkansas, Delaware, Connecticut, Illinois, Rhode Island, Minnesota, Nevada, New York, Pennsylvania, and Maine, have crafted statutes that attempt

134. *See* Barry T. Hirsch & David Macpherson, *The Shrinking American Labor Union*, N.Y. TIMES (Feb. 7, 2015), https://www.nytimes.com/2015/02/08/business/the-shrinking-american-labor-union.html [http://perma.cc/UZG3-W774].

135. *See Drug Scheduling*, DEA, https://www.dea.gov/drug-scheduling [http://perma.cc/7NLG-4PFH] (last visited Mar. 12, 2020).

136. Bodie, *supra* note 122, at 254.

137. *See* 350 P.3d 849, 853 (Colo. 2015).

138. Chris Roberts, *Why Legal Cannabis Can Still Get You Fired*, LEAFLY (Aug. 28, 2018), https://www.leafly.com/news/politics/labor-day-blues-why-legal-cannabis-can-still-get-you-fired [http://perma.cc/7JLQ-WN7C].

to protect the rights of medical cannabis patients in the employment context to some degree.[139] In some cases, the protections do not come from the medical cannabis acts, but rather through acts tied to legalizing recreational cannabis.[140] Yet, most of these state statutes are limited in their protection of employee rights, as they do not necessarily compel employers to accommodate medical cannabis patients in the workplace.[141] This essentially means that if a certified medical cannabis patient is found to have used cannabis on the job (as determined by drug-testing), the patient-employee could be subject to termination or other adverse employment action.[142] In some states, if an employee has a job classification that is considered "safety designated," the statutory protections are nonexistent.[143] Therefore, many employees are still under the threat of losing their jobs and may be hard-pressed to find another one when drug testing is the policy.

Despite the decisions in *Coats*, *Ragingwire* and *Emerald Steel*, courts may be more favorable toward employees where the relevant state laws are more specific in their protections. For example, in September 2018, a Connecticut federal district court found in favor of an employee who had been denied employment after having failed a pre-employment drug test.[144] The statute at issue in the case was the anti-discrimination provision of the Connecticut Palliative Use of Marijuana Act ("PUMA"), which states that "unless required by federal law or required to obtain funding . . . No employer may refuse to hire a person or may discharge, penalize or threaten an employee solely on the basis of such person's or employee's status as a qualifying patient . . . ."[145] The plaintiff claimed that her doctors had recommended the use of cannabis to alleviate symptoms of PTSD and so informed her employer about her status as a registered medical cannabis patient.[146] However, the employer refused to hire her after she tested positive for cannabis during a pre-employment drug test.[147] The employer argued that it was exempt from PUMA because of its status as a federal

139. *See State Laws Protecting Medical Marijuana Patients' Employment Rights*, CAL. NORML, http://www.canorml.org/state_laws_protecting_medical_marijuana_patients_employment_rights [http://perma.cc/GCJ8-Q89Z] (last visited Mar. 12, 2020).

140. For example, Illinois' employment protection provisions are found under the CRTA. *See* Cannabis Regulation and Tax Act, H.B., 1438, 2019 Gen. Assemb. 101st Sess. (Ill. 2019), § 10-50(a).

141. Roberts, *supra* note 138.

142. *Id.*

143. *Id.*

144. Noffsinger v. SSC Niantic Operating Co., LLC, 338 F. Supp. 3d 78 (D. Conn. 2018).

145. CONN. GEN. STAT. § 21a-40p(b)(3) (2012), https://www.cga.ct.gov/current/pub/chap_420f.htm#sec_21a-408p [http://perma.cc/Z7VS-SHLT].

146. *Noffsinger*, 338 F. Supp. 3d at 82.

147. *Id.*

government contractor and was instead required to comply with the preemptive federal funding provisions of the Drug-Free Workplace Act ("DFWA").[148] The court sided with the employee: "The DFWA does not require drug testing . . . nor does the DFWA prohibit federal contractors from employing someone who uses illegal drugs outside the workplace in accordance with a program approved by state law."[149] While the court's decision is not binding,[150] it suggests courts may lean toward protecting the privacy rights of employees when it comes to drug testing medical cannabis patients—at least in states with carefully crafted statutes.

Other states are taking note and implementing their own restrictions on drug testing for cannabis. In Maine, as of February 1, 2018, protections for employees who consume cannabis outside of work have been extended for adult-use in addition to medical use,[151] but the application of the law is less clear. Maine's law attempts to provide some employee protections in that it prohibits employers from disciplining employees for cannabis use outside of work, although the law does allow employers to "discipline employees who are under the influence of marijuana in the workplace."[152] An employee may be drug tested, but if the employee fails the drug test he or she is not necessarily subject to an adverse employment action; rather, the burden is on the employer to prove that the employee was actually under the influence while at work.[153] Julie Rabiowitz, the state's Department of Labor director of policy explains how Maine's policy is different from other states:

> If the Legislature does not take action to provide clear, consistent, easy to follow regulations, Maine risks more employers leaving the state. Let's stop thinking of drug testing as something punitive. Rather, it incentivizes employees, especially those in recovery, to stay clean, and promotes a safer work environment for all workers.[154]

148. *Id.* at 84.

149. *Id.*

150. Jennifer Mora & Anthony Califano, *Federal Judge Rules that Employer Violated Connecticut Law by Refusing to Hire Medical Marijuana User*, BLUNT TRUTH (Sept. 12, 2018), https://www.blunttruthlaw.com/2018/09/federal-judge-rules-that-employer-violated-connecticut-law-by-refusing-to-hire-medical-marijuana-user/#more-2496 [http://perma.cc/GN3T-ERGF].

151. Melinda Caterine, Dale Deitchler, Nancy Delogu & Jeff Dilger, *Maine Employers Must Ignore Off-Work Marijuana Use, Cease Testing Applicants*, LITTLER (Jan. 30, 2018), https://www.littler.com/publication-press/publication/maine-employers-must-ignore-work-marijuana-use-cease-testing [http://perma.cc/P7G5-F85A].

152. ME. STAT. TIT. 28-B, § 112(3)(2018), http://legislature.maine.gov/statutes/28-B/title28-Bsec112.html [http://perma.cc/T9G5-6B6Z].

153. Penelope Overton, *Extra Burden Expected in 2018 for Maine Employers who Test for Marijuana*, PRESS HERALD (July 24, 2017), https://www.pressherald.com/2017/07/24/maine-employers-shouldnt-test-for-marijuana-without-changes-to-state-law-official-says/ [http://perma.cc/Z8QD-PY8W].

154. *Id.*

Law firms that represent employers suggest that "employers with lawful workplace drug-testing policies implemented in accordance with Maine law will need to assess compliance approaches, risks and risk tolerance in connection with marijuana policy prohibitions, continued marijuana testing and adverse action, if any, based on verified confirmed marijuana test results."[155] This seems to suggest that employers are likely to face challenges in implementing drug testing policies because taking adverse employment action against an employee would take more than a drug test result. However, it may be just as challenging for a medical cannabis patient to show that their cannabis use was outside of work if an employer claims they are under the influence at work and the employee tests positive. Thus, an employee who uses cannabis outside of work may still be at risk for an adverse employment action. For these reasons, Maine's law attempts to strike a balance, but may be too ambiguous in application and may not go far enough in protecting employee privacy rights.

C. Illinois: Limited Privacy Protections for Medical Cannabis Patients in Light of Otherwise Progressive State Law

As of January 1, 2020, residents of Illinois over the age of twenty-one will legally be able to purchase and consume a limited amount of cannabis for recreational use under the CRTA, making Illinois the 11th state to legalize cannabis for recreational use.[156] The new law will also make it easier for people previously convicted of cannabis possession to have their criminal records expunged.[157] In addition, Illinois has taken the initiative to provide opportunities to those considered "social equity applicants," with the intention of giving assistance to those looking to start a cannabis business in communities considered "hardest hit by the war on marijuana," according to Illinois governor J.B. Pritzker.[158] In addition to signing the CRTA into law, Pritzker also made the existing medical cannabis program permanent, expanding it to encompass several new qualifying conditions, including chronic pain, migraines, anorexia nervosa, and osteoarthritis.[159]

155. Caterine et al., *supra* note 151.

156. *Illinois Weed Legalization Guide*, ABC 7 CHI. (Sept. 30, 2019), https://abc7chicago.com/politics/weed-legalization-guide/5337346/ [http://perma.cc/J76T-S6SY].

157. *Id.*

158. *Illinois Releases 'Disproportionately Impacted Areas' Map For Social Equity Cannabis Program Applicants*, ABC 7 CHIC. (Sept. 30, 2019), https://abc7chicago.com/business/illinois-releases-map-for-social-equity-cannabis-program-applicants/5579443/ [http://perma.cc/D6VY-42G6].

159. Tom Schuba, *Pritzker Makes Medical Marijuana Program Permanent, Adds List of New Conditions*, CHI. SUN TIMES (Aug. 12, 2019),

Medical cannabis patients will also enjoy enhanced benefits under the new law, including an exemption from the taxes levied on recreational cannabis and the option to grow up to five plants in their homes.[160] In totality, the new Illinois cannabis laws are likely some of the most progressive in the country. However, the new laws continue to lack adequate protection for certified medical cannabis patients when it comes to employer drug-testing, not unlike Maine's recreational cannabis law. At the very least, the text of the CRTA related to employment policies regarding cannabis is vague enough to concern employees and employers alike.[161]

Section 10-50 of the CRTA clearly states "[n]othing in this Act shall prohibit an employer from adopting reasonable zero tolerance or drug free workplace policies, or employment policies concerning drug testing . . . provided that the policy is applied in a nondiscriminatory manner."[162] Furthermore, "Nothing in the Act shall limit or prevent an employer from disciplining an employee or terminating employment of an employee for violating an employer's employment policies or workplace drug policy."[163] Based on this language, it is likely that blanket pre-employment drug-testing that tests all applicants equally will be seen as reasonable and non-discriminatory, regardless of an applicant's status as a certified medical cannabis patient under state law. There are no exceptions in the CRTA for certified medical cannabis patients that would exempt them from pre-employment drug-testing if an employer decides to maintain such a policy.[164]

In addition, employers are given specific protections under Section 10-50(e) of the CRTA against employee actions if the employer had a "good faith belief that an employee used or possessed cannabis in the employer's workplace or while performing the employee's job duties or while on call in violation of the employer's employment policies."[165] Section 10-50(d) articulates a set of examples by which an employer may determine whether an employee is "impaired or under the influence of cannabis"

https://chicago.suntimes.com/cannabis/2019/8/12/20802391/pritzker-makes-medical-marijuana-program-permanent-adds-list-new-conditions [http://perma.cc/5NVA-8H96].

160. *See Illinois Weed Legalization Guide*, *supra* note 159.

161. Steven Pearlman, *Illinois' Hazy New Law Legalizing Recreational Use Of Marijuana*, FORBES (Aug. 15, 2019), https://www.forbes.com/sites/stevenpearlman/2019/08/15/illinois-hazy-new-law-legalizing-recreational-use-of-marijuana/#2caf4694511a [http://perma.cc/PUN8-XVWA].

162. Cannabis Regulation and Tax Act, H.B. 1438, 2019 Gen. Assemb. 101st Sess. (Ill. 2019) § 10-50(a), https://www2.illinois.gov/IISNews/19996-Adult_Use_Cannabis_Legislation.pdf [http://perma.cc/G5NZ-YLUQ].

163. *Id*. at 10-50(d).

164. *Id.*

165. *Id*. at 10-50(e).

while acting as agent of the employer.[166] However, although prior to taking disciplinary action against an employee, the employer "must afford the employee a reasonable opportunity to contest the basis of the determination,"[167] there is nothing to suggest that certified medical cannabis patients would have adequate standing to challenge such a determination based solely on having a valid medical cannabis certification. Therefore, medical cannabis patients in Illinois are likely not exempt from any employer drug testing unless the employer's drug testing is considered unreasonable or discriminatory. If an employer maintains a policy that treats all applicants and employees generally the same when it comes to drug testing and the testing is standardized, it is unlikely that employees will be able to bring a claim based on one of these required elements under § 10-50 of the CRTA. Importantly, the CRTA continues to enforce these employer rights under the Illinois Compassionate Use of Medical Cannabis Pilot Program Act, which likewise does not provide medical cannabis patients with an exemption from an employer-mandated drug test.[168] As Illinois legalizes cannabis for recreational use, medical cannabis patients appear to be left out in the cold in terms of employment protection. Amendatory legislation to the CRTA should be drafted to better protect medical cannabis patients in Illinois from adverse employment actions based on an employer's cannabis drug testing so that employees do not need to choose between their medicine and employment opportunities.

IV. CONCLUSION

Medical patients who are certified under state laws to legally consume cannabis for the treatment of a myriad of medical issues often face a difficult choice when it comes to employment, (1) either use medical cannabis and risk failing a drug test or, (2) go without their medication and suffer. Such a choice is absurd, illogical, and against public policy. One solution would be to remove cannabis from the restrictive Schedule I classification under the CSA, in the hope that most employment drug testing for cannabis would abate. But absent such successful action at the federal level, state legislatures should alternatively craft laws that protect certified medical cannabis patients from adverse employment actions when the adverse employment actions are based on overbroad drug testing methods. Rather than

166. *Id.* at 10-50(d).

167. *Id.*

168. *Illinois Recreational Marijuana Bill Awaiting Gov. Pritzker's Signature: Workplace Considerations*, CLARK BAIRD SMITH, LLC (June 4, 2019), https://www.cbslawyers.com/marijuana [http://perma.cc/JHM9-JNNV].

defer to federal law regarding cannabis, where applicable, courts in states where cannabis is legal should abide by the intent of the state legislature and state constituents by protecting certified medical cannabis patients against unreasonable adverse employment actions and privacy invasion. However, effective and unambiguous state legislation regarding medical cannabis and employment drug testing is the foundation for ensuring fairness and balance in the courts. Therefore, it is up to state legislatures and local governments to solve the problem by amending existing laws or ensuring protections are in place as states prepare to legalize cannabis.